

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS

— — —

THE HONORABLE LYNN N. HUGHES, JUDGE PRESIDING

AIMS INSTITUTE, PLLC, )  
ET AL., )  
Plaintiffs, )

v. )

NO. 4:22-CV-02396

MERRICK GARLAND, ET AL. )  
Defendants. )

CONFERENCE  
OFFICIAL REPORTER'S TRANSCRIPT OF PROCEEDINGS  
Houston, Texas  
October 17, 2022

APPEARANCES:

For the Plaintiffs: Shane Pennington, Esq.

For the Plaintiffs: Matthew Zorn, Esq.

For the Defendant: Jimmy Anthony Rodriguez, Esq.

Reported by: Mary Nancy Capetillo, CSR, RPR, TRR  
Official Court Reporter  
United States District Court  
Southern District of Texas  
mary\_capetillo@txs.uscourts.gov

Proceedings reported by computerized stenotype  
machine.

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PROCEEDINGS

THE COURT: Mr. Rodriguez, whom do you represent?

MR. RODRIGUEZ: Your Honor, I represent the United States.

THE COURT: Mr. Pennington?

MR. PENNINGTON: Yes, Your Honor.

THE COURT: Whom do you represent?

MR. PENNINGTON: The plaintiffs, AIMS Institute, Dr. Sunnil Aggarwal, Kathryn Tucker, and Matthew C. Zorn.

THE COURT: So that would be the plaintiffs?

MR. PENNINGTON: Yes, Your Honor.

THE COURT: Mr. Zorn?

MR. ZORN: Your Honor, I am here to represent myself as well as the other plaintiffs. This is a bit unusual for me, but that is the case.

THE COURT: What is your -- what's your background? Are you just --

MR. ZORN: I'm a partner at Yetter Coleman. I also -- as far as this case is related, I also run a newsletter where I publish news stories; and I write opinion pieces as well. So this is a FOIA case. So it both relates to my practice as a lawyer but, also,

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1 I write stories relating to drug policy and defendants'  
2 activities.

3 THE COURT: I think I understand,  
4 Mr. Rodriguez, can you explain to me from the position  
5 of the United States why Congress passed the information  
6 act?

7 MR. RODRIGUEZ: I'll do my best, Your  
8 Honor. I'm, as you know, a humble AUSA. I don't dare  
9 to speak for Congress; but as I understand it, it's  
10 about accessing records, about accessing documents. The  
11 government has lots of documents, and historically  
12 they -- the public wasn't allowed to see them to  
13 understand what the government was doing. So Congress  
14 passed FOIA to allow the public to access documents,  
15 records, things that the government had in its files.  
16 The unique thing about this case, it's a FOIA case; but  
17 they're not seeking any documents; and that's the reason  
18 why I filed the motion to dismiss, Your Honor.

19 THE COURT: All right. So what is your  
20 client's characterization of what they are seeking?

21 MR. RODRIGUEZ: So the plaintiffs are  
22 complaining about the process by which my client is  
23 using to process FOIA requests. So the DEA invoked an  
24 extension. It's a relatively short extension, a number  
25 of days, because they deemed it a complex request; and

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1 the plaintiffs argue that that was wrong, and they  
2 shouldn't have invoked that extension.

3 So I understand what they're saying, but  
4 in our view the Fifth Circuit hasn't recognized this  
5 kind of claim. As I said at the beginning, it's not  
6 about seeking documents. It's a complaint about the  
7 procedures, the bureaucracy, the process; and that's  
8 something in our view that they have not properly pled,  
9 and that's why we move to dismiss it.

10 THE COURT: Is he the one with the  
11 ineffective documents?

12 MR. RODRIGUEZ: I've spoken to Mr. Zorn;  
13 and I believe that he's going to speak for the  
14 plaintiffs, Your Honor.

15 THE COURT: Okay. But you know what he's  
16 going to say. I don't.

17 MR. RODRIGUEZ: Yeah. He -- Mr. Zorn is  
18 one of the persons or entities that has requested  
19 documents from the DEA. So Mr. Zorn in his requests are  
20 one of the ones we -- the DEA has invoked this extension  
21 of time; and that's what they're complaining about, that  
22 they allege that was wrong.

23 THE COURT: How long is the extension?  
24 I'm sorry. How long is the extension?

25 MR. RODRIGUEZ: I'm going to get this

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1 wrong probably, and Mr. Zorn is far more immersed in  
2 this. I think it's 20 days or something, 10 or 20 days'  
3 extension if we deem it a complex matter; but I could be  
4 wrong on that, the exact days.

5 THE COURT: All right. Let's make him  
6 work.

7 MR. ZORN: Thank you, Your Honor. So  
8 we've been having a good working relationship so far,  
9 and I appreciate that. Let me explain to the Court.

10 THE COURT: You're lucky to have him.

11 MR. ZORN: I can see why, but let me  
12 explain the policy in kind of common-sense terms. The  
13 first is this is not called an extension. It's called  
14 an unusual circumstances exception, and my complaint is  
15 every single FOIA request I've filed with them has been  
16 marked as unusual circumstances. I asked them for a  
17 poster, just a poster. I told them who had it, and they  
18 said they needed more time. And it's not a 20-day  
19 extension. It's an indefinite extension. There's no --  
20 there's no -- they can delay as much as they want. This  
21 actually interfered with my representation of a client.

22 I was in an administrative proceeding, and  
23 I wasn't able to get it through the administrative  
24 proceeding because there are no -- the discovery rules  
25 are very different. So I used FOIA. That's what

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1 Congress intended FOIA to be used for. Then they said  
2 unusual circumstances, and they didn't respond to my  
3 request. By the time they did respond to the request,  
4 the proceeding was over.

5 So this unusual circumstances policy, let  
6 me describe it for the Court. The statute says if a  
7 record is kept in an establishment that is separate from  
8 the office processing the request, they can invoke it:  
9 Unusual circumstances exception. Congress included this  
10 in the FOIA statute in the '70s because back then it was  
11 possible that we would request something at -- from a DC  
12 office, and it would be held in a Philadelphia office or  
13 Los Angeles; and they would need more time to go search  
14 it.

15 This is how the government construes it  
16 today, and I kid you not. If someone were to request a  
17 record and this was the office processing the record and  
18 it were kept in Judge Rosenthal's courtroom, they would  
19 say that's unusual circumstances because they would have  
20 to walk down the hall to another office. They're saying  
21 any record that is not kept in the FOIA processing  
22 office, like the office that, like, processes these  
23 requests, any document, any email -- which, by the way,  
24 are kept on the cyberspace and they're not hard to  
25 retrieve -- is unusual circumstances. And as a result,

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1 everything is unusual circumstances; and basically the  
2 Department of Justice has created this giant policy  
3 where they don't have to timely respond to anyone's  
4 requests. And it's absurd.

5 And so I'm here because it's interfering  
6 with my advocacy. It's interfering with my ability to  
7 get records on a timely basis, and I want the Court to  
8 stop it because they've perverted the statute.

9 THE COURT: How many records of what kind  
10 are kept in the FOIA's office itself? Indirectly, he's  
11 representing them.

12 MR. RODRIGUEZ: I don't know, Your Honor.  
13 I think Mr. Zorn did -- the fact that the DEA is  
14 interpreting it as if it's not in the FOIA office and  
15 it's in another office that they have -- in at least  
16 some of these cases that he's complaining about have  
17 invoked this exception. I don't know how many they  
18 keep, you know, on hand at the -- at the FOIA processing  
19 center or office.

20 MR. ZORN: Your Honor, it could be a  
21 three-by-three closet. I mean, I don't know what it is;  
22 and this is -- this is my suggestion on how to proceed  
23 with the case. I don't want to drag this out. I don't  
24 think we need extensive discovery. There doesn't need  
25 to be a trial. This is a summary judgment case. I just

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1 need some floor plans, answers to questions that you  
2 asked. A 30(b)(6) deposition is what I would -- my  
3 preference would be of the Department of Justice and DEA  
4 of a list of topics, and then we'll do this case on the  
5 papers.

6 I mean, the legal issue, right -- we've  
7 just described it -- is whether the statute is construed  
8 one way or another; and -- but the questions you have,  
9 we just need to get simple answers; and then we're done.  
10 I don't want this to be a protracted case.

11 THE COURT: In fairness to him, he doesn't  
12 hang out at the FOIA office.

13 MR. RODRIGUEZ: Right.

14 THE COURT: He works here in town most of  
15 the time.

16 MR. RODRIGUEZ: Right. And I agree that  
17 this -- if the motion to dismiss is not granted and the  
18 case moves forward, this is a case that would be  
19 resolved on cross-motions for summary judgment. It  
20 primarily presents a legal issue, but our position is it  
21 is still a FOIA case. In FOIA cases discovery is the  
22 exception, not the rule. We should be provided an  
23 opportunity to provide an affidavit with our summary  
24 judgment explaining what we did and why we did it, and  
25 we can provide information about the FOIA office. And



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1 then if at that point there's a problem and they believe  
2 there should be discovery, then we can address whether  
3 an exception to the rule prohibiting discovery in FOIA  
4 should be allowed. But that would be our position.

5 THE COURT: Are you proposing that the  
6 government file an explanatory document where they write  
7 who did what when?

8 MR. RODRIGUEZ: Yes, Your Honor. And  
9 that --

10 THE COURT: Where is the goody?

11 MR. RODRIGUEZ: Where is the document?  
12 Right. So, yes, that would be my proposal, Your Honor,  
13 and that that affidavit or declaration --

14 THE COURT: I'm going to summarize his  
15 position. He doesn't want to know where the person was  
16 captured. He wants to know where they're buried.

17 MR. RODRIGUEZ: So that declaration, that  
18 affidavit would accompany a motion for summary judgment.

19 THE COURT: With the document?

20 MR. RODRIGUEZ: With an explanation --

21 THE COURT: No, with the document.

22 MR. RODRIGUEZ: With the -- yes, Your  
23 Honor.

24 THE COURT: We don't know that there is  
25 one. We don't know that -- and this is not my first

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1 FOIA case. They want to send more affidavits about why  
2 they didn't do something that, however long it took, it  
3 wouldn't take as long as getting them to do something;  
4 and it seems to me we need a more substantive response.

5 If they want to come and tell us: It's in  
6 Charlie's office and he's been committed, so we're going  
7 to go ahead and get somebody else to go in the office  
8 and see what's in there, I can't see why that -- a great  
9 big government, which has at this point had ample time  
10 to do all kinds of things, can't just say: This is the  
11 document that you wanted.

12 The burden of answering requests is what  
13 the act insists be done. So if you can't do what the  
14 act -- the principle of the act, shouldn't it go get  
15 another job? That's what you're saying: We can't do  
16 it; we can't do it.

17 MR. RODRIGUEZ: I understand.

18 THE COURT: The government creates the  
19 mess, and then they say a year later that we don't know  
20 what to do about that. But they do know. Everything's  
21 filed, you know.

22 MR. ZORN: Your Honor, might I suggest and  
23 respond to Mr. Rodriguez a little bit briefly? I don't  
24 view this case as a typical FOIA case. I understand --

25 THE COURT: Okay. You've got to speak up.

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1 MR. ZORN: Sorry. I don't view this case  
2 as a typical FOIA case. What Mr. Rodriguez is saying,  
3 they're going to include an affidavit with their summary  
4 judgment motion. I would like to see that affidavit  
5 before the summary judgment motion. I think that's what  
6 I would be entitled to see.

7 It's a pattern/practice claim. I'm not  
8 concerned about -- I would like to know how these  
9 particular requests are processed, but this is a  
10 government policy; and it's disturbing, and I would like  
11 to get answers. Yeah.

12 THE COURT: My government too. I deal  
13 with it a lot. Mr. Pennington, do you want to --

14 MR. PENNINGTON: Yes, Your Honor?

15 THE COURT: -- help me?

16 MR. PENNINGTON: Help you?

17 THE COURT: Please.

18 MR. PENNINGTON: Yes, Your Honor. Well, I  
19 think that I would just reiterate what Mr. Zorn has  
20 said, that really what we're after here is to know what  
21 possible justification there could be for a policy that,  
22 you know, categorially delays access to public records  
23 that we're entitled to under FOIA.

24 And it appears from the motion to dismiss  
25 that the Government's position is that that policy might

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1 not exist; and to the extent that that is the  
2 Government's position, very limited discovery would root  
3 that out and get to the bottom of that and move on to  
4 summary judgment. If there is this policy, the only  
5 question for you is whether it's legal. So that's why  
6 we're here.

7 THE COURT: The policy of: We'll get to  
8 it when we want to?

9 MR. PENNINGTON: Not -- well, that's part  
10 of it; but the primary issue is when you file a request  
11 if the document you're looking for isn't in the office  
12 of the FOIA officer processing the request, like  
13 literally sitting on their desk or, I guess, in a file  
14 in that office, then they say that it's unusual. And  
15 since it's unusual, which it's not -- it's absolutely  
16 the usual; but they say it's unusual; and, therefore,  
17 they get extra time, an indefinite amount of extra time  
18 which, as Mr. Zorn explained, often effectively means no  
19 access to records when the public needs them and  
20 directly undermines the purpose of FOIA.

21 THE COURT: What are the agencies  
22 involved?

23 MR. PENNINGTON: The United States Drug  
24 Enforcement Administration, which is a component of the  
25 Department of Justice; and that is the only agency that

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1 we're concerned about in this case.

2 THE COURT: Do you know where its  
3 headquarters is?

4 MR. PENNINGTON: Washington, D.C. Pardon  
5 me, Your Honor. Is DEA in Virginia?

6 MR. RODRIGUEZ: DEA is in Arlington,  
7 Virginia.

8 MR. PENNINGTON: Sorry. Yeah, I want to  
9 correct that. The Drug Enforcement Administration's  
10 headquarters is in Arlington, Virginia. DOJ's  
11 headquarters is in Washington, D.C.

12 MR. ZORN: And, Your Honor, we believe  
13 it's a DOJ policy; but DEA is the one receiving the  
14 request, but we think it's a Department of Justice  
15 policy.

16 THE COURT: The agency with the document,  
17 that is an agent -- a document of that agency? And has  
18 anyone told you that: We have it; we just can't get to  
19 it?

20 MR. PENNINGTON: So the statute requires  
21 them to make a determination whether they'll be able to  
22 produce the records within 20 days, and the issue is  
23 whether and when they are required to make that  
24 determination.

25 Their position is: We're not saying

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1 whether the documents exist or whether we can give you  
2 those documents. We're just telling you they're not in  
3 the office of the person who received your request; and  
4 as a result you fall into the unusual circumstances  
5 bucket which puts you into administrative purgatory for  
6 an indefinite period of time. So before we even start  
7 looking for the document, because it's not in the  
8 recipient's office, the delay has already begun.

9 THE COURT: So are we talking -- we're not  
10 talking medical drugs?

11 MR. PENNINGTON: Some of these requests  
12 were related to administrative procedures that had to do  
13 with medical -- medical drugs is kind of a loaded term  
14 in this context, Your Honor. I don't know if you  
15 mean -- what you mean by that; but some of the processes  
16 had to do -- some of these records had to do with  
17 administrative proceedings involving drugs, regulated  
18 drugs.

19 THE COURT: But it's not criminal. It's  
20 not....

21 MR. PENNINGTON: No, Your Honor.

22 THE COURT: So that's why you're here this  
23 morning. What discovery would be reasonable before you  
24 respond to the motion to dismiss?

25 MR. PENNINGTON: I'd like for Mr. Zorn to

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1 be able to speak to that, if he could, because he's the  
2 one who knows more precisely which questions. I think  
3 that all that we would want is a 30(b)(6) deposition and  
4 maybe the answer to -- answers to a few questions; but  
5 Mr. Zorn can be more specific, I think, if that's okay.

6 MR. ZORN: Yes, Your Honor. Just one  
7 30(b)(6) deposition, both defendants -- one 30(b)(6)  
8 deposition, both combined, and then really targeted  
9 document requests like a floor plan of the agency, for  
10 example, five or fewer; I think that's basically all we  
11 need.

12 THE COURT: So a "cyber viewer"?

13 MR. ZORN: No. Like five or -- five or  
14 fewer. I mean, we would want to provide the Court like  
15 statistics on this. For example, like the exception is  
16 unusual circumstances. We'd like to know how many of  
17 the hundred -- if you get a hundred, how many you mark  
18 as unusual circumstances.

19 From our experience we're batting at  
20 100 percent with a dozen. But I think that it would be  
21 useful for the Court to know: Okay. How often is  
22 something unusual? But that's the type of discovery we  
23 need. The only reason we need discovery, Your Honor, is  
24 we -- we think there's a pattern, practice, and policy;  
25 and the government is kind of denying it. So we would

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1 like a 30(b)(6) deposition. That's the main discovery  
2 we need, and we're ready to go to cross-motion and  
3 summary judgment after that.

4 THE COURT: The chunk of questions should  
5 deal with what actually happens at the agency. Who  
6 opens the mail? Who sorts it? Why they do it. And  
7 then you address the responsiveness. If it's not in  
8 this office, where is it? Second floor down, that's one  
9 thing.

10 Now, if it's in Northern Montana where the  
11 temperature's minus degrees -- many degrees, the request  
12 can't get to them because there's no end, that we just  
13 don't want to. So I would like to see the questions  
14 before I pass them on to him.

15 MR. PENNINGTON: Your Honor, if I may.

16 THE COURT: Yes, sir.

17 MR. PENNINGTON: So we have a pending  
18 motion to dismiss, and our response is due in a few  
19 days; and, you know, if the Court has any questions  
20 about that, you know, we'd be happy to discuss it. You  
21 know, our position, as we've laid out, is that this is a  
22 summary judgment case; and the question seems to be  
23 whether this policy exists, A. B, is it lawful? That's  
24 why we want discovery; but there doesn't seem to be any  
25 question that -- I mean, unless -- well, I should say he



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1 is correct that the Fifth Circuit has not acknowledged  
2 the pattern/practice claim under FOIA; but other courts  
3 have including the Ninth Circuit and the DC Circuit.  
4 This Court is, of course, free to say otherwise; and if  
5 you were to do that, then we should lose; and the Court  
6 should --

7 THE COURT: What I can't understand is how  
8 the government that is put there -- the unit of the  
9 government that is put there to hand over copies -- and  
10 this is not -- I think I mentioned -- not my first case  
11 with these gentlemen.

12 MR. RODRIGUEZ: Your Honor, I think the  
13 legal issues that were being described -- I mean, they  
14 could also be addressed in a motion for summary  
15 judgment; and it may be the most efficient path forward  
16 to just address all -- the legal issue and then this  
17 issue about the documents in one shot; and then Your  
18 Honor can resolve it once and for all, and we can all  
19 move on with our very busy lives.

20 THE COURT: Thank you.

21 MR. PENNINGTON: That's what I meant to  
22 say, Your Honor.

23 THE COURT: The Court will take a stern  
24 view of anyone who loses, spills ink on, can't find it  
25 this week but found it last week. Sort of tired of

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1 that. We've got the complaint. We've got a motion to  
2 dismiss. Rather than rule on that, I'd rather break it  
3 into the sections that he suggests because we've got to  
4 answer these questions so somebody gets something back  
5 when they ask for it.

6 MR. RODRIGUEZ: And, Your Honor, if I may.  
7 Would you permit the parties to propose a schedule for  
8 accomplishing this, and that way we can confer and look  
9 at our schedules? I don't want to commit to dates today  
10 that I'm going to have trouble with, and then we can set  
11 a schedule.

12 THE COURT: No, I would like for you-all  
13 to do that because it's easy for me to say next  
14 Wednesday. Although sometimes I'm amused when a knowing  
15 lawyer of considerable experience says: Judge, I'd like  
16 a different date on that; and I say, oh, of course. And  
17 let's assume I said October 30th. And then they respond  
18 the 30th -- then they can have it on October 1st. Then  
19 he says, no, I meant.... I said, I know what you meant.  
20 What he said was just give me a date.

21 But, yes. As much as I like traveling, I  
22 don't want you-all flying around a lot when you don't  
23 need to. So the only deadline I need is a rough  
24 estimate of when you-all get together and have something  
25 because I'll just wait on it.

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1 Have I had you before?

2 MR. ZORN: Yes, Your Honor.

3 THE COURT: It's that bad?

4 MR. ZORN: I was here with Tracy LeRoy.

5 We were on the defense side of perhaps the smallest  
6 contract case known to man; and we got it resolved,  
7 so....

8 THE COURT: Well, thank you.

9 MR. RODRIGUEZ: Thanks to Your Honor, we  
10 got it resolved.

11 THE COURT: I frequently have  
12 conversations with lawyers. If they're good lawyers,  
13 they know their case; and sometimes that's all it takes.  
14 They quit posturing for their clients and figure out  
15 where the money is and how it can be done or if they're  
16 really that broke or whatever. It's just not TV stuff.  
17 I'm certainly not.

18 What do you think?

19 MR. RODRIGUEZ: A week, Your Honor, for us  
20 to propose a schedule; and then Your Honor can approve  
21 or modify.

22 THE COURT: Let me give you two weeks.

23 MR. RODRIGUEZ: Thank you, Your Honor.

24 THE COURT: And you can file it tomorrow  
25 if you get it done, but I'd rather you not be pressured

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1 by an arbitrary deadline.

2 MR. ZORN: And, your Honor, for the  
3 schedule, are we talking about a schedule for -- I guess  
4 I'm a little confused on the content.

5 MR. RODRIGUEZ: My understanding was Your  
6 Honor wanted a time for the plaintiffs to submit the  
7 topics for the 30(b)(6) deposition to the Court to  
8 review, and then I think we would propose a date for a  
9 30(b)(6) deposition and then a deadline for motions for  
10 summary judgment or cross-motions for summary judgment;  
11 and then that way the Court would have everything it  
12 needs to resolve the case.

13 THE COURT: But I don't want to find out  
14 that everybody who could give a knowledgeable decision  
15 is in training in Waxahachie.

16 You practice in DC?

17 (Discussion off the record.)

18 MR. ZORN: Your Honor, before we go, I  
19 just want to put on the record that the motion to  
20 dismiss and the arguments that I made in there are held  
21 in abeyance, that the plaintiffs don't have to respond  
22 to that motion, that we're proceeding with this other  
23 schedule.

24 THE COURT: We're going to send him on a  
25 vacation. Florida, don't you think?

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1 MR. RODRIGUEZ: Thank you, Your Honor.

2 THE COURT: All right. I'm rather fond of  
3 my children, but my grandchildren are much better.

4 (Discussion off the record.)

5 THE COURT: All right.

6 MR. RODRIGUEZ: Thank you.

7 THE COURT: If something dramatic comes  
8 up, file something in paper that says we have a problem  
9 and need help and file it. Don't write Glenda. Don't  
10 call her. Get her a message, "It's in the record"; and  
11 we'll see you.

12 MR. PENNINGTON: Yes, Your Honor.

13 MR. RODRIGUEZ: Thank you, Your Honor.

14 MR. ZORN: Thank you, Your Honor.

15 (Proceedings concluded.)

16 \* \* \* \* \*

17 I, Mary Nancy Capetillo, certify that the foregoing  
18 is a correct transcript from the record of proceedings  
19 in the above matter.

20 April 4, 2023

21 /s/MaryNancyCapetillo  
22 Signature of Court Reporter  
23  
24  
25